

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ELEVEN MILLION NINE  
HUNDRED TWENTY-TWO  
THOUSAND THREE HUNDRED  
(11,922,300) ASSORTED BRANDS  
OF CIGARETTES, *et al.*,

Defendants.

NO. CV-03-256-RHW

**ORDER DENYING PLAINTIFF'S  
MOTION TO DISMISS**

Before the Court are Plaintiff's Motion to Dismiss Claim of Blacksheep Distributing (Ct. Rec. 67) and Motion to Dismiss Claim of L.A. Nelson, Inc. d/b/a Burke's Distributing (Ct. Rec. 70). A hearing was held on the motions on March 22, 2006. Plaintiff was represented by Jane Kirk. Claimant Blacksheep Distributing was represented by Carl Oreskovich; Claimant Burke's Distributing was represented by David Grosbeck.

**PROCEDURAL BACKGROUND**

On July 18, 2003, the United States filed a complaint for forfeiture of 11,922,3300 cigarettes that were previously seized as contraband. Plaintiff also filed a related complaint for forfeiture of a cash and a bank account. The two cases were consolidated in the above-captioned case. Claimants Blacksheep Distributing and Burke's Distributing filed Notices of Claim to Seized Property. Plaintiff now moves to dismiss the claims of Burke's Distributing and Blacksheep Distributing,

**ORDER DIRECTING PARTIES TO CONFER; SETTING TELEPHONIC  
STATUS CONFERENCE ~ 1**

1 asserting that the claimants are merely unsecured creditors, and as such, they lack  
2 standing to bring a claim against the seized property.

### 3 DISCUSSION

#### 4 A. Standard of Review

5 In ruling on a Fed. R. Civ. P. 12(b)(6) motion to dismiss for lack of standing,  
6 the court must accept as true all material allegations of the complaint, and must  
7 construe the complaint in favor of the complaining party. *Hong Kong Supermarket*  
8 *v. Kizer*, 830 F.2d 1078, 1080 (9<sup>th</sup> Cir. 1987).

#### 9 B. Standing

10 In order to have standing to contest a civil forfeiture under Article III, a  
11 claimant must have a sufficient interest in the property to create a case or  
12 controversy. *United States v. Real Property Located at 5208 Los Franciscos Way*,  
13 385 F.3d 1187, 1191 (9th Cir. 2004); *United States v. One Lincoln Navigator 1998*,  
14 328 F.3d 1011, 1013 (8th Cir.2003). The standard is not a rigorous one: “the  
15 claimant need demonstrate only a colorable interest in the property, for example,  
16 by showing actual possession, control, title, and financial stake.” *5208 Los*  
17 *Franciscos Way*, 385 F.3d at 1191.

#### 18 C. Forfeiture Statute

19 Claimants assert that they have a claim against the forfeiture cigarettes and  
20 money under the innocent owner defense.<sup>1</sup> In order to assert the innocent owner  
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22 <sup>1</sup>18 U.S.C. § 983(d)(1) provides for an innocent owner defense.  
23 Specifically, the statute states:

24 An innocent owner's interest in property shall not be forfeited  
25 under any civil forfeiture statute. The claimant shall have the burden  
26 of proving that the claimant is an innocent owner by a preponderance  
27 of the evidence.

28 18 U.S.C. § 983(d)(6) sets out the definition of “owner”:

1 defense, claimants must have a colorable interest in the property sought to be  
2 forfeited. At the hearing, Plaintiff conceded that claimants have a colorable  
3 interest in the cigarettes as an unpaid cash-seller. Plaintiff challenged the  
4 claimants' assertions that they had a colorable interest in the seized cash and bank  
5 account. At this point in the proceedings, the Court accepts the claimants' claims  
6 that they have a colorable interest in the money as true. Because questions of fact  
7 exist regarding this issue, it would be better handled on a motion for summary  
8 judgment after discovery has been completed.

9 Accordingly, **IT IS HEREBY ORDERED:**

10 1. Plaintiff's Motion to Dismiss Claim of Blacksheep Distributing (Ct.  
11 Rec. 67) is **DENIED**.

12 2. Plaintiff's Motion to Dismiss Claim of L.A. Nelson, Inc. d/b/a Burke's  
13 Distributing (Ct. Rec. 70) is **DENIED**.

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20 In this subsection, the term "owner"—

21 (A) means a person with an ownership interest in the specific  
22 property sought to be forfeited, including a leasehold, lien, mortgage,  
23 recorded security interest, or valid assignment of an ownership  
24 interest; and

25 (B) does not include--

26 (i) a person with only a general unsecured interest in, or claim  
27 against, the property or estate of another.  
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1       **IT IS SO ORDERED.** The District Court Executive is hereby directed to  
2 enter this order and to furnish copies to counsel.

3       **DATED** this 30<sup>th</sup> day of March, 2006.

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5                               s/ Robert H. Whaley

6                               **ROBERT H. WHALEY**  
7                               United States District Judge

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